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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x
4 ANTRON McCRAY, et al.,
5 Plaintiffs,

v.

03CV9685 (DAB) (RLE)

6 THE CITY OF NEW YORK, et al.,
7 Defendants.
8 -----x

New York, N.Y.
November 13, 2012
3:05 p.m.

Before:

HON. RONALD L. ELLIS
U.S. Magistrate Judge

10 APPEARANCES

11 MOORE & GOODMAN
12 Attorneys for McRay, Santana, Richardson Plaintiffs
13 JONATHAN MOORE
14 - and -
15 MICHAEL W. WARREN
16 ROGER WAREHAM

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19 MYRON BELDOCK
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24 JANE H. FISHER-BYRIALSEN
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26 NEW YORK CITY LAW DEPARTMENT
27 Office of the Corporation Counsel
28 for the City of New York
29 GENEVIEVE NELSON
30 Senior Counsel
31 ANDREW MYERBERG
32 PHILIP DE PAUL
33 Assistant Corporation Counsel

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1 (Case called)

2 THE COURT: My law clerk tells me that there may have
3 been some offices that were still not up to communicating and
4 therefore belatedly found out about the conference. With
5 respect to whether or not that was a problem for me, I did not
6 think that that was cause to change the conference.

7 First of all, it was not my intention frankly to have
8 the parties give oral argument at this conference. I have
9 reviewed the submissions and I am prepared to rule.

10 Secondly, we believe that given the disruptions of
11 Sandy that a telephone call was the best means to get in touch
12 with individuals. Not only were you disrupted but the court
13 was disrupted including our transmission of things to our
14 docket.

15 Finally, we certainly expected that to the extent that
16 the conference had clearly not gone forward on the date it was
17 scheduled, that we would expect that the lawyers would call us
18 and find out what plans we had made.

19 Taking all those things into account, we, we meaning
20 me, believed that we should go ahead with the conference.

21 In addition, as I have indicated to the parties, this
22 case has been pending for a long time and it's my intention to
23 make sure that discovery gets completed as expeditiously as
24 possible given the disputes that the parties have. With
25 respect to that, before I give my rulings, I did want to put

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1 what I am going to say about the rulings in some perspective
2 and to tell you this will also give you some indication of why
3 my rulings are what they were going to be.

4 As you all know, the general discovery rule is that
5 you get discovery on any matter which is not privileged that is
6 relevant to a claim or a defense of one of the parties. Even
7 with this description there are times when relevant information
8 that is not privileged still receives a measure of protection.
9 The way that's usually done obviously is the party who is
10 trying to protect the information makes a motion under Rule
11 26(b) seeking a protective order from the court.

12 The stipulated protective order that the parties
13 usually come to agreement on is designed to facilitate the
14 process of discovery by eliminating the need for constantly
15 coming to the court by not requiring the parties to constantly
16 make motions and, therefore, delay the matter.

17 Unfortunately in this case, the stipulated protective
18 order has not worked that magic. Indeed, based on how many
19 times the parties have come to me with disputes about the
20 stipulated protective order, you might say that the implicit
21 contract that you had between counsel and Judge Batts has not
22 been honored by the parties and certainly has not been
23 successful. We have had as I said numerous occasions in which
24 I have had to moderate disputes from the parties concerning
25 what has been designated confidential. That continued court

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1 invention has contributed to the delays in resolving the case.

2 It seems to me that the heart of the problem frankly
3 is that in fashioning the protective order, the parties in
4 determining how disputes should be resolved put the onus on the
5 party who was opposing the designation of confidentiality.
6 While courts don't generally intervene in those decisions, it
7 can work either way depending on what the situation is, I find
8 that in this situation that has not worked. Indeed, I find
9 that in part it has not worked because the city has been
10 overbroad in its designations of confidentiality.

11 In the interests of moving the matter forward, I have
12 determined that placing the onus on the party opposing the
13 designation has resulted in too many disputes. It's resulted
14 in too many conferences. Frankly, it's resulted in too much
15 wasted time by the parties and by the court. So the first
16 fundamental change that I am going to make, I don't know if
17 there is any precedent for it, but I am going to change the
18 stipulated protective order. Since you did get the court to
19 sign off on it, it's my belief that the court has the authority
20 to do this; that is, to change that portion of the stipulated
21 protective order so that the party claiming confidentiality,
22 whether it be the plaintiff or the defendant, shall have the
23 burden of maintaining that designation.

24 It is certainly true that regardless of whether or not
25 you are defending or opposing a designation, it is the court's

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1 expectation that the parties will act in good faith and
2 therefore if they are acting in good faith, whom we put the
3 burden on shouldn't make a difference. But the best laid plans
4 of the parties and the best laid plans of the court obviously
5 did not work out in this case.

6 Because as I said implicit in that is that the parties
7 will act in good faith, that effort begins with the attorneys.
8 So from this point on, I am putting the attorneys on notice
9 that I am going to hold them personally responsible for the
10 disagreements they are going to have concerning the
11 designations of confidentiality.

12 That means that I am going to put you on notice that I
13 will hold the lawyers personally responsible, including
14 possible sanctions under 28 U.S.C. Section 1927, if in my
15 determination the positions taken by one side or the other are
16 inconsistent with their duties to the court and to this case as
17 counsel to make sure that the positions that they take with
18 regard to whether or not something should be confidential is a
19 well-founded position. That means that the city should not
20 over-designate and that in proper cases the plaintiffs should
21 not oppose the designation of things as confidential.

22 One of the things that I found most disturbing about
23 the last conference is that at one point in the conference, the
24 plaintiffs had indicated that if the defendants were going to
25 maintain their position, that the plaintiffs were going to

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1 withhold positions that they had originally taken.

2 I will tell you that with respect to some of the
3 information that was redacted, including Social Security
4 numbers, addresses, and phone numbers, it seems to me that
5 that's the kind of classic information that is subject to
6 protective order. Whether you call it a privilege or whether
7 or not it's a protective order under 26(c), that's the kind of
8 information that is entitled to some protection from the court.
9 It's almost such that you don't even have to explain why that
10 information should not be public knowledge.

11 Now, to the extent that it's an application under
12 26(c) or an application of what the defendants have called the
13 official information privilege, it still qualifies and
14 therefore is subject to the question of how relevant the
15 information is to the claims and defenses in the case, so that,
16 while on the surface, a telephone number might not be something
17 that should be disclosed, it does not rule out the possibility
18 that in a specific case, a telephone number may be appropriate
19 for disclosure.

20 So in that balancing, the court needs to have
21 appropriate information to make the determination. So at least
22 with respect to the privilege claimed by the defendants, I do
23 find that the courts have recognized such a privilege and the
24 privilege, however, does require that the party requesting the
25 privilege make a threshold showing that there is some specific

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1 need for keeping the information confidential. That can be
2 potential harm to people who are identified, potential
3 disclosure of information that is sensitive or personal.

4 With that threshold showing, then the court can turn
5 to the party who seeks to have the information and ask that
6 party to indicate why the information is important, and when I
7 say important I of course mean relevant. That allows the court
8 to balance the harm of disclosure and the relevance of the
9 information sought.

10 With respect to the specific issues in this case,
11 because of the way the parties briefed the issues, I don't have
12 a clear sense of what the plaintiffs think is the relevant
13 portion of the information sought to be protected by the
14 defendants. So, I am going to order a couple of things.

15 First, with respect to the application of the
16 privilege, the defendants will only be allowed to claim the
17 privilege with respect to specific identified categories of
18 information, that is, to the extent that they say David Bird,
19 Social Security number or address, that information will be put
20 into the hopper for balancing. There will be no protection for
21 anything or any catchall categories that include similar to,
22 like, or related. Everything that is sought to be protected
23 must be specifically identified by category so there won't be
24 any mistakes by me or the plaintiffs as to what categories are
25 being sought to be redacted and sought to be protected.

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1 With respect to the issues that have already been
2 raised, I am going to put the parties on an expedited schedule
3 so that we can wrap this up as quickly as possible. I have to
4 assume that to the extent that you have been banging these
5 issues back and forth, that it should not take the parties too
6 long to get back to the court. So, with respect to the issues
7 that are specifically enumerated in the defendants' letter to
8 the court, I find that those specific enumerations have met the
9 threshold. To the extent that the plaintiffs believe that the
10 court should find that the relevance of the information
11 outweighs any protection that should be afforded, I will give
12 the plaintiffs 48 hours to identify which ones they are and to
13 tell me what is the relevance of the information.

14 With respect to that submission from the plaintiffs,
15 the plaintiffs will be allowed in an appropriate case where
16 they specifically identify a privilege to submit in camera.
17 Otherwise, I expect that you will submit your reasons for
18 saying that the information is relevant and you will share a
19 copy with the defendants. What I mean by that is, I can
20 envision a situation in which the plaintiffs' description of
21 why the information is relevant requires them to disclose,
22 perhaps work product or attorney strategy. To the extent that
23 is specifically articulated, I will review that in camera.

24 Bear in mind that everything I say in terms of
25 submissions will carry with it the weight of personal

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1 responsibility for the attorneys. I don't want any makeweight.
2 I don't want anything withheld or submitted to me in camera
3 which on its face to me seems something which should be
4 submitted to the defendants. After the plaintiffs makes that
5 submission, then I will make a determination without delay
6 concerning whether or not the information should be redacted.
7 The idea here is that we will only allow redactions on
8 specifically enumerated and designated kinds of information.

9 With respect to information which has already been
10 designated as confidential, I am not rescinding any of those
11 confidentiality designations. I do recognize that in their
12 submissions the plaintiffs have indicated that they may have
13 had plans to challenge some of those designations. To the
14 extent that the plaintiffs wish to challenge specific
15 designations, I expect that they will identify those without
16 delay. Without delay means, given the fact that we have a
17 holiday coming up next week, I will expect a week after the
18 Friday after Thanksgiving for any such opening up of the
19 confidentiality at least in terms of designations.

20 I will expect defendants' one week after that to
21 indicate which of those things challenged by the plaintiffs
22 they intend to continue to seek protection. That includes
23 protection not only of things that are claimed to be privileged
24 but things that are claimed to be things that might cause
25 annoyance, embarrassment or oppression without having any

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1 countervailing relevance to the matters before the court.

2 Any questions? Then I will get on to the specific
3 rulings. With respect to the question of sanctions which were
4 raised by the parties, I hope implicit in this is that, while I
5 think that in appropriate cases, sanctions should be imposed by
6 the court, I think in general sanctions are a distraction and
7 only in the most egregious cases should we talk about
8 sanctions. While I may have some questions about whether or
9 not the designations by the city are overbroad, I don't see a
10 basis for sanctions from the court.

11 With respect to the city's applications for sanctions
12 against the plaintiffs, having reviewed the information
13 concerning officer Sheehan, I think this really is a product of
14 the over-designation of confidentiality. That is, there were
15 so many issues that were disclosed about officer Sheehan, that
16 even as I was reading it, it's hard to know where one draws the
17 line about what was disclosed and what wasn't disclosed and
18 whether or not certain language was used or certain
19 particularities were used in terms of the kinds of
20 investigations that were done. It appeared to me that with
21 respect to what was said by plaintiffs' counsel during the
22 conference at that point certainly was not clear in terms of
23 any violation of the confidentiality stipulation as it existed,
24 certainly nothing that would require the court to impose
25 sanctions.

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1 With respect to official information privilege, in
2 large part I have given you my rulings with respect to that,
3 that is, I do believe that with respect to the information that
4 was already identified by the defendants at our last
5 conference, that that information met the threshold and that
6 final rulings on that will await the plaintiffs' submission
7 concerning the relevance of the information that's being
8 sought. Specifically, if the plaintiffs believe that the
9 Social Security numbers or dates of birth or phone numbers are
10 relevant to claims, then they will make those known to me so
11 that I can determine whether or not on balance it is
12 appropriate to afford protection or to order disclosure.

13 With respect to the defendants' claim that the
14 plaintiffs have been both belatedly providing information in
15 discovery, as to whether or not that requires any sanction from
16 the court, the short answer is no. I know that in a number of
17 cases there have been delays in producing information; however,
18 in terms of whether or not there is going to be sanctions, the
19 first thing that we are going to talk about is whether or not
20 the information that has been delayed has prejudiced the
21 parties and how it has prejudiced the parties.

22 You are now on the brink of trying to come to
23 final dates for having the discovery completed. I know that
24 you have been trying to work out dates for the depositions. As
25 I have indicated before, I find the idea of looking back more

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1 distracting and more delaying rather than looking forward. In
2 that regard, my question to you is this: With respect to the
3 scheduling of the depositions, how is that progressing? If you
4 have any questions about what I have ordered, you can ask me
5 that now or you can go ahead and answer the question.

6 Yes.

7 MS. FISHER-BYRIALSEN: Your Honor, I think since our
8 meeting and the letter we sent you there has been no
9 progression. That's the plaintiffs' point of view. There were
10 two depositions that were scheduled during the storm. Those
11 have now canceled and we don't have new dates for them.

12 MR. MYERBERG: There has been discussion on a date for
13 Angela Cuffee, one of familial plaintiffs. That was not on the
14 schedule. It is now set for the end of November. With respect
15 to the depositions that were canceled, we are trying to figure
16 out a date for a detective whose deposition was canceled. We
17 are waiting for plaintiffs to provide us a date for Vern Fonda,
18 the Inspector General for DOCS.

19 We are still doing our best. We have obtained some
20 dates after conferring with Ms. Fisher-Byrialsen about some of
21 the other nonparty witnesses that were in the park on April 19.
22 We have obtained some additional contact information. We are
23 trying to locate those individuals to determine whether they
24 will be amenable to subpoenas.

25 We are doing our best to put people on the calendar

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1 and trying to set firm dates. We are going to continue to do
2 that. Our priority is to get the parties finished. We are
3 working towards those ends. I think there are only three
4 familial plaintiffs remaining to be deposed, I could be wrong,
5 and the five official plaintiffs.

6 MS. FISHER-BYRIALSEN: What concerns us, your Honor,
7 is that we have provided dates for almost all the plaintiffs
8 but that we have no commitments on dates for any of the
9 defendants as of yet. They still remain the broad dates of
10 March or April. We don't have any proposals at all as to
11 specific date.

12 MR. MYERBERG: One of the issues we are having, your
13 Honor, is that we did meet and confer with Mr. Beldock and
14 Ms. Dippold, among others, about some of the parameters for the
15 assistant district attorney depositions, particularly with
16 respect to the privileges that are going to be asserted mostly
17 likely at those depositions, if we could work around to
18 try to figure out a way to have them answer as many questions
19 as possible without asserting privilege blanket over most of
20 the questions asked at the depositions.

21 We have been speaking. I think where we left it was
22 Mr. Beldock was going to think about the issue and get back to
23 us. That being said, if they have an answer for us with regard
24 to that, we can schedule the ADA depositions. It was our
25 position that we should try to meet and confer and reach some

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1 sort of agreement between the parties before progressing into
2 the depositions. That being said, we can provide dates for the
3 depositions. I think we have floated date ranges on the
4 schedule that both parties jointly signed off on.

5 MS. NELSON: I just want to make it clear, your Honor,
6 that the majority of the defendants' depositions have been
7 completed. We have produced those individuals. Their
8 depositions have been taken. We are talking about five
9 remaining depositions, three of which are ADA depositions. We
10 have attempted in the past to schedule those depositions,
11 particularly the ADA depositions, and because of issues with
12 respect to plaintiffs' counsel, we had to adjourn those. We
13 have no issue with adjourning them. When the time came, it was
14 clear plaintiffs couldn't take those depositions at the time.

15 But we just want the court to understand that we are
16 not trying to somehow delay these depositions. We are working
17 on this issue as to the privilege. We think that resolving
18 those before we take the depositions is the proper way to
19 proceed. We have conferred with plaintiffs' counsel about
20 that. I understand they might have a different opinion as to
21 how to approach this than we do. But it's not that we have not
22 been conferring with respect to those. I believe with respect
23 to the calendar, which I don't have in front of me, you will
24 see that there are ranges of times to take those depositions.
25 There was one that was actually scheduled for either November

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1 or December and we decided to put that off, pending the parties
2 meeting and conferring with respect to this issue.

3 THE COURT: If I understand correctly, you have
4 ranges; they want specific dates. Is that what we are talking
5 about. It's not my practice to intervene when the parties are
6 trying to schedule depositions, but I do want it to be clear to
7 the parties that either you agree on the dates or I am impose
8 the dates. If I am impose the dates, I will order the person
9 to be there under pain of sanctions for failing to appear at
10 the deposition. It depends on who I find is at fault in not
11 scheduling the depositions; obviously, if one party gives four
12 dates and other party gives one date, that may be more of a
13 problem. But you don't want me to be involved in this.

14 MR. WARREN: Your Honor, I had a follow-up discussion
15 with Mr. Myerberg just before we commenced today. I indicated
16 to him and other counsel for defendants that Ms. Cuffee would
17 be available for deposition the Thursday and Friday after
18 Thanksgiving. She was supposed to be deposed before that but
19 because of Sandy, there was an inability to do so. We want her
20 to be deposed right away. Also, I indicated that Mr. Santana
21 Sr. and Joanne Santana are available to be deposed, and we all
22 agreed we would try to do that as expeditiously as possible.

23 THE COURT: Are these proposals and conversations
24 committed to writing?

25 MR. MYERBERG: Your Honor, yes.

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1 THE COURT: Because if I have to go back and look at
2 it, I want to know who proposed what and when. It sounds as if
3 you are both saying we are doing the best we can.

4 MR. WARREN: Your Honor, I think the earlier
5 discussions were in writing. I was not part of that; I think
6 Mr. Moore was. This was a follow-up to Mr. Moore's previous
7 arrangements with counsel as far as those depositions are
8 concerned. I would just like to add one thing further.
9 Counsel has talked about them being ready for purposes of, or
10 making available their clients for depositions. Your Honor,
11 obviously, in order to have an effective deposition, you need
12 relevant documents. I think that has always been the sticker.
13 We have not had the relevant documents and they have not given
14 us the relevant documents so that we can conduct an effective
15 and meaningful deposition.

16 It's not as if we have been recalcitrant and we have
17 been holding it up. We simply have said that we need the
18 relevant documents so that we can conduct a meaningful
19 deposition and proceed on to the ultimate resolution of this
20 case. We have always maintained that posture and that position
21 and we still do. Again, our clients could be made available.
22 Mr. Santana Sr. could be made available in a very short period
23 of time, Joanne Santana, and as I said as to Ms. Cuffee, it is
24 my understanding there won't be any problem in terms of them
25 accommodating us to have her deposed on the first Thursday and

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1 Friday after Thanksgiving.

2 MR. MYERBERG: Your Honor, I know you don't like the
3 tit-for-tat, so I don't want to do that. The dates that we, we
4 jointly met, plaintiffss counsel and defendants' counsel met
5 for a period of hours. We talked about the dates in advance of
6 your order to provide a deposition schedule. We reached
7 agreement on date ranges. My understanding, maybe I was wrong,
8 was that when we got closer to those depositions, plaintiffs
9 would say what about this date or that date and we would say to
10 them what about this date or that date for those depositions.

11 I don't understand where this part is coming from. My
12 understanding is that we would reach agreement as we had
13 agreement on the date ranges. That being said, I don't think
14 we are withholding our clients for depositions. I don't think
15 that's what's happening. I don't think we are withholding
16 documents that they would need to take the depositions. For
17 example, Linda Fairstein's deposition was on the calendar a
18 year and a half ago and it was canceled by plaintiffs. So I
19 don't think that's what we are really looking at now.

20 MS. NELSON: The court is being left with two
21 misimpressions. The first is that we are not meeting and
22 conferring with respect to the deposition schedule.

23 Mr. Myerberg, myself, Ms. Dippold, Ms. Fisher-Byrialsen met for
24 a couple of hours and came up with the schedule that was
25 submitted to the court. Since then we have been having

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1 discussions with respect to the schedule, whether by telephone
2 or by email, to come up with specific dates and to move the
3 players around so that we have a time where we can get these
4 depositions done. So I don't want to leave the court with a
5 misimpression that plaintiffs have been providing dates and we
6 have not been responding.

7 THE COURT: Let me remind you of something else since
8 you all are talking about what I don't like and what I do like.
9 I don't take representations from counsel as fact. If I am
10 going to rule on any of these issues, it's not going to be
11 based on anything that is said in this conference. If
12 Ms. Fisher-Byralsen wants to make an application, she will
13 submit an affirmation to support it, and I will rule on it
14 then. But what she says now is free of charge.

15 I don't have an impression because I have not gotten
16 anything that is backed up by anybody sworn. Until that
17 happens, I am not ruling. I am not making any impressions. I
18 don't know that what she is saying is the truth or what you are
19 saying is the truth. I will tell you this, however, that as I
20 said, if somebody is responsible for not having a deposition
21 taken, I will order the deposition taken. If somebody does not
22 produce documents and a deposition is taken and then those
23 documents are produced, that person will be re-deposed.

24 These are the facts. I don't know whether or not
25 anybody is going to cause that to happen. You are all

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1 advocates; you are putting a spin on it. If you think you are
2 going to get my heart by saying something here, it's not going
3 to happen.

4 MS. NELSON: Fair enough, your Honor, but there are
5 representations being made in open court and we would just like
6 to address them.

7 THE COURT: I will let lawyers make those
8 counterpoints, but if you are concerned that I am now taking as
9 gospel anything that she says, you can forget that.

10 MS. NELSON: Not so much gospel, no disrespect to
11 Ms. Fisher-Byralsen, but if there are issues being addressed
12 in open court, we would like to address them.

13 The second one has to do with relevant information not
14 being produced before deposition. We are a little baffled by
15 that. We take great pains if we have the documents in our
16 possession to produce them before depositions and quite frankly
17 the last two instances of documents not being produced before
18 depositions actually came from plaintiffs' counsel where we
19 showed up at the deposition and for the first time we saw
20 documents or we were informed as to information that we had not
21 had either before the conference or 24 hours before the
22 deposition.

23 So, if there are specific instances where Mr. Warren
24 or any of the plaintiffs' counsel believes that there are
25 documents that we have not given them in advance of a

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1 deposition, if they send us a letter, we will tell them as we
2 have so far in discovery if we have it or if we don't have it.

3 THE COURT: I expect no less from either side. This
4 goes for both plaintiffs and defendants. Indeed, this is the
5 way I do it for any litigation. If someone does not produce
6 documents and a deposition is taken, you are going to get
7 another shot at it if you can convince me that the failure to
8 produce was the other side's failure. That's not for this
9 case; that's just the way it is.

10 MR. BELDOCK: Your Honor, may I address the
11 outstanding discovery that we need in order to take the Sheehan
12 and Arroyo depositions. The recent production as a result of
13 your Honor's ruling was very helpful to us from our point of
14 view. We have considerable more materials now. When we left
15 court last time I believe our adversaries said that there were
16 a bunch of specially copied, some kind of microfiche, something
17 like that, disciplinary files that they were going to find out
18 about and then produce if they could. That's outstanding.

19 Secondly, they were supposed to produce and I have
20 been told that they are going to produce releases for the
21 Arroyo and Sheehan DWI or DUI cases. We have not got those
22 yet.

23 Third, your Honor stated at the last meeting,
24 conference that the adversaries should advise you when the
25 documents, the disciplinary documents that don't exist anymore

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1 if they don't exist anymore, became unavailable. I have raised
2 that issue with my adversaries and I have said to them that
3 they produced a series of affidavits from police officers who
4 went into files and said they couldn't find these files,
5 including some of the files that are quite relevant to our
6 depositions that we intend to take of Arroyo and Sheehan.

7 I suggested to them that they have not answered the
8 question as to when the files became unavailable. In my prior
9 experience there are logs kept when files are kept by the
10 police department. The logs indicate when documents are
11 removed or not removed. My prior experience is also that if
12 documents are destroyed, police departments give directives as
13 to when documents are to be destroyed. That's a kind of a
14 grouping of information that we don't have.

15 It would be important to us if we found out that the
16 documents involving certain of Sheehan's investigations, for
17 example, disappeared during the course of this litigation, and
18 if not, if not, so we don't have to go on any wild goose
19 chases. I have that all information that we need. We need
20 that set of documents that they were going to find if they
21 would be reproduced, they were talking about the cost of it and
22 how it could be done, the releases for the DWI charges, DUI
23 charges, and representations from people who are knowledgeable
24 as to why these documents are unavailable in the Sheehan and
25 Arroyo disciplinary charges.

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1 Remember there are a series of cases and they said we
2 can't find those files, we only have these files. They said
3 some of these files will be quartered in some special way and
4 we have to get some information about it. Then there was my
5 follow-up question which I have written them about that I
6 understand that files are not destroyed automatically or
7 disappeared or made unavailable automatically, that there is a
8 police directive. I have had it in other cases with the city
9 or police department cases that say destroy such and such
10 document, this is the reason why. Then there are logs. There
11 certainly are logs that show when documents are taken out and
12 put back in.

13 That's my waterfront of issues that I have outstanding
14 after which they are resolved we can take the Sheehan and
15 Arroyo depositions.

16 MR. DePAUL: Your Honor, if I may address what
17 Mr. Beldock just said. First with respect to the magneto
18 optical disks that I discussed at the last conference and were
19 mentioned in my letter, I do apologize for the lateness of that
20 submission to the court; Sandy put things in general disarray.
21 We will have those submissions to your Honor tomorrow, tomorrow
22 morning, along with a letter explaining and three declarations
23 regarding what was stored, what information we can get, what
24 information was stored, as well as the process and cost of what
25 it will take to get the information off those disk in as much

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1 detail as possible as your Honor said at the last conference.

2 With respect to the releases that Mr. Beldock
3 mentioned regarding Sheehan and Arroyo's DWI arrests, it's our
4 understanding that the court ruled at the last conference that
5 defendants were to produce the files that we could obtain
6 related to those arrests. Ms. Daitz my colleague has informed
7 Mr. Beldock that we are in the process of obtaining those files
8 and we should be able to produce them fairly shortly as soon as
9 we do receive them. We dispute that the court ordered
10 defendants to produce releases for detectives Sheehan and
11 Arroyo to plaintiffs. I think that's the area of disagreement
12 between what Mr. Beldock just said.

13 MS. NELSON: We have obtained any necessary
14 authorizations that we needed and we obtained the files. Those
15 are the files we intend to produce to plaintiffs. That was the
16 court's intention and that's certainly what we intend to do.

17 MR. BELDOCK: That would be satisfactory of course.

18 THE COURT: It looks like we are ending on a note of
19 agreement.

20 MR. DePAUL: One last final point, I believe I did
21 address this in my letter to the court dated October 5, with
22 respect to the information that can no longer located, first,
23 we have provided the court with affidavits regarding searches
24 that were conducted for the files that were requested. Those
25 were the searches that were conducted. We believe there is

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1 sufficient information in there regarding the searches. We
2 have still instructed the NYPD to continue their searches.
3 Those searches are ongoing. To the extent, as I have informed
4 Mr. Beldock, that any of those files are located, we will
5 produce them in accordance with the court's order.

6 The problem with respect to when the files became
7 unavailable is the institutional knowledge. As the court is
8 aware, the most recent of these files are over 20 years old.
9 There is simply no person that we could find with the
10 institutional knowledge regarding when these files could no
11 longer be located. We can continue to provide as much
12 information that we can. The problem is the information that
13 we are looking for simply is not there.

14 THE COURT: With respect to these kinds of issues when
15 things go missing, whether they go missing officially,
16 unofficially or whatever, we gather all the information and
17 then the court determines at the end whether or not a
18 particular order will address the inability to produce the
19 information. So, at this point I am just getting the parties
20 to give me the information and in the end I will decide what is
21 the appropriate to thing to do about it.

22 So, I don't think any options, I was going to say no
23 options are off the table, but perhaps a nuclear option is off
24 the table, but I want to gather all the facts. I want to know
25 as best you can what happened when and sometimes the fact of

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1 the matter is if you are not able to provide information that
2 may inure to your detriment too. I just don't know. I don't
3 know what information you are going to provide. I will wait to
4 see and then you both can argue what seems appropriate. You
5 might argue it is what it is and Mr. Beldock may argue that
6 this is some serious breach. Let's see what the totality of
7 the information is then I will hear your arguments.

8 MR. DePAUL: Thank you, your Honor.

9 THE COURT: OK.

10 MS. NELSON: Your Honor, two issues with respect to
11 your ruling. The first one has to do with your Honor's ruling
12 that the party claiming confidentiality now has the burden of
13 justifying why that designation is necessary. I believe
14 plaintiffs' application to the court that generally raised this
15 issue was with respect to the 2008 stipulation. As your Honor
16 knows, there are two confidentiality stipulations in this case,
17 one from 2008, another one from 2010. So my inquiry has to do
18 with whether your Honor's change as to who bears the burden is
19 also appropriate for the 2010 stipulation as well.

20 MS. DIPPOLD: Your Honor, it was our intention in the
21 near future to make a motion with respect to the 2008
22 confidentiality agreement asking initially although not
23 ultimately for transcripts, trial transcripts from the criminal
24 trial, all documents that were used in the criminal trial, all
25 newspaper articles. We did not designate those documents as

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1 confidential. I gather from the defendants' approach to this
2 that they think we should tell them the Bates numbers for those
3 documents if we are going to ask that they be made
4 deconfidentialized.

5 I think since they unilaterally imposed them that what
6 should happen is that we should ask for those documents to be
7 marked as no longer confidential and that it should be the
8 defendants' burden to figure out which of the Bates numbers
9 have been attached to those particular documents. We are not
10 at this point asking that medical records or any photographs of
11 the victims, the names of the victims, the names of the people
12 with confidential files should be disclosed. Some of that will
13 come later. Certainly we are going to be making an application
14 at some point to get the disciplinary records in front of the
15 public, to get the records of the Armstrong Commission and the
16 information about who actually prepared the Armstrong
17 Commission report before the public.

18 THE COURT: Bearing in mind my admonition that I want
19 these issues identified soon after Thanksgiving; whether you
20 make the application or not, I want to know what's coming down
21 the pike.

22 MS. DIPPOLD: Right. With respect to the 2010
23 stipulation which pertains to the plaintiffs' documents,
24 virtually everything that has been produced pursuant to that
25 stipulation is an employment record, is a plaintiff's medical

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1 record, all very highly confidential documents. It would be
2 inappropriate, we are not asking for those documents to be
3 released at this time with respect to the defendants, it would
4 be very inappropriate for the plaintiffs' medical records to be
5 made not confidential.

6 One other issue that came up before has to do with the
7 district attorneys' depositions. Also they are asking to take
8 the depositions of the attorneys who represented the defendants
9 in the criminal case, our clients in the criminal case, which
10 is going to involve similar issues of attorney-client and
11 work-product privileges. It is my understanding that what the
12 city is proposing is that their clients, the district attorneys
13 Linda Fairstein, Elizabeth Lederer, Tim Clements would be
14 allowed to testify to anything they wished to testify to except
15 for things that they want to designate as privileged or work
16 product while the documents that pertain to these very issues
17 will remain confidential.

18 So we would not be able to use the documents to
19 impeach their testimony which from our perspective violates the
20 fairness doctrine. So I think the court has to anticipate that
21 there probably is going to be a motion with respect to those
22 particular depositions.

23 THE COURT: Is that true, that they will be able to
24 testify about things which you are withholding documents about.

25 MS. NELSON: I don't think it is as simple as that. I

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1 don't believe that this issue is ripe for judicial
2 intervention. We have certainly met and conferred with
3 plaintiffs' counsel.

4 MS. DIPPOLD: We have.

5 MS. NELSON: We have asked if they were going to raise
6 this at the conference and we were told they were not. If they
7 had told us they were going to raise it, we certainly would be
8 much more prepared to talk about these issues, but there is
9 actually little authority to support our position. The other
10 issue, your Honor, you have already ruled on the privilege of
11 certain documents, including documents that were prepared by
12 the ADAs as work product.

13 We are all trying to work together, I thought, so that
14 we could come up with some agreement whereby we are not
15 stopping this deposition every five minutes on the grounds of
16 privilege and seeking a ruling from your Honor. We are trying
17 to cooperate, work this out. If we can't, of course we will do
18 what we have always done, bring the issues to the court's
19 attention. I believe the last time we spoke about this in any
20 detail, Mr. Beldock asked us to send him our legal authority,
21 we did and we invited him to respond and we are awaiting that
22 response.

23 So, it's a little unfair for the plaintiffs to bring
24 this up now knowing that we are all still meeting and
25 conferring.

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1 THE COURT: Which specific issue are we talking about
2 now.

3 MS. NELSON: The issue of what the ADAs can testify to
4 at their depositions. With respect to medical records by the
5 plaintiffs, we are not seeking to de-designate any documents
6 that have been previously designated under the 2010
7 stipulation. That wasn't what my inquiry was. My inquiry had
8 to do with whether going forward any documents designated as
9 confidential under the 2010 stipulation will also have to abide
10 by your Honor's change, which is, whoever designates them as
11 confidential has the burden.

12 THE COURT: The short answer is yes.

13 MS. NELSON: We are the ones producing the documents.

14 THE COURT: Right. Just to be clear how I expect this
15 to work, if something is designated as confidential, then the
16 other side, if the other side disagrees, then the one who wants
17 it to be confidential has that threshold burden that would be
18 under 26(c) to tell me what would be the harm caused by it. At
19 that point, I need to know the relevance of it for the other
20 side. At that point, it would be a regular 26(c) order from
21 the court which does not require that it made be made public;
22 it just may mean that it gets produced.

23 MS. NELSON: So the court understands, the majority of
24 the documents being produced pursuant to the 2010 stipulation
25 which are plaintiffs' records are actually being produced by

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1 the defendants. We just want to be clear as to how your
2 Honor's change with respect to the confidentiality stipulations
3 would work for both confidentiality stipulations. Thank you.

4 Your Honor, one last thing.

5 THE COURT: It's just a question of who has the burden
6 to bring it to the court.

7 MS. NELSON: Right.

8 THE COURT: And it's only prospective.

9 MS. NELSON: Thank you.

10 MS. DIPPOLD: I would just add that I don't disagree
11 that the issue with respect to the deposition testimony of the
12 ADAs is in fact not quite ripe for the court's attention, but
13 we do expect that we are going to have to bring it to the
14 court's attention.

15 THE COURT: Just warning me what I have to look
16 forward to.

17 MS. DIPPOLD: Yes.

18 THE COURT: Thanksgiving.

19 MS. NELSON: The only other issue I would like to
20 raise, as part of your ruling, you gave plaintiffs 48 hours I
21 believe to bring to the court's attention any one of the
22 categories that are outlined in defendants' letter, to bring to
23 your attention any of those that they believe are categories
24 that they should get. You didn't discuss whether defendants
25 would get an opportunity to respond to the extent there was

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1 something other than what was discussed in our initial letter.

2 THE COURT: That's correct; I did not.

3 MS. NELSON: We will get an opportunity or will not.

4 THE COURT: I didn't want to put in too many time
5 limits. I figure if you get it and you want to respond, you
6 let me know.

7 MS. NELSON: Thank you, your Honor.

8 THE COURT: That's assuming that it's not something
9 which they are claiming some privilege which they submitted in
10 camera obviously. Anything else. OK. Then I guess you have
11 your calendars out. About another month from now, do you have
12 anything that you scheduled to meet that would conflict with a
13 month from now.

14 MR. MYERBERG: A deposition of Mr. McCray might be
15 scheduled for December 12 and 13.

16 MR. BELDOCK: I don't think we have anything on
17 December 17.

18 THE DEPUTY CLERK: December 17, at 2:30 p.m.

19 THE COURT: If there is nothing further, we will be
20 adjourned. I hope you all have a Happy Thanksgiving and don't
21 overeat.

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